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MAY 27 1955
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO BRIEF OF UNITED STATES IN OPPOSITION AND TO BRIEF OF UNITED STATES AS AMICUS CURIAE.

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May 26, 1955.

THE DONNELLEY-GARDEN PRINTING COMPANY, CHICAGO

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The United States has filed two briefs in this cause—one of 26 pages in opposition to the petition for writ of certiorari, and one of 15 pages as *amicus curiae*. In the brief in opposition 16 pages of the 26 pages are devoted to a purported summarization of the record in the trial court under the heading of "statement" and contains numerous inaccuracies and erroneous inferences, which are later used as a basis for the Government's argument. In the brief as *amicus curiae* 6½ pages of the 16 pages are similarly

devoted. The fact that the Government deems it necessary to refer at such great length to the record, rather than to the opinion of the court below, indicates that this Court should take this case on certiorari. The Government apparently feels that the opinion below will not stand on its own merits, and is attempting to bolster it in this strange manner.

In other words, the Government briefs, in referring back to the record of the trial court, rather than to the opinion in the court below, as the basis of its briefs, conclusively points up the fundamental fact that the opinion of the court below was not such an opinion as can stand on its own feet.

Petitioners maintain that it is not good judicial practice for an appellate tribunal to dispose of substantial private and public interests in a manner which leaves the grounds of the decision to conjecture, and especially so where a remand is involved. This Court should take this case in the exercise of its supervisory powers.

The filing of a brief by the United States as *amicus curiae* and the filing of a brief by it in the same capacity in the Court of Appeals are, of themselves, direct admissions of the complicity of the Government and of the truth of the findings of fact entered by the trial court in the cross-claims portion of this case.

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STATEMENT.

The Government's statement of the case in its reply in the condemnation proceeding is of no importance as the sole question is one of the value of the petitioners' leaseholds and the judgments based on the jury verdicts are clearly within the range of the evidence introduced on the trial of this issue.

An analysis of the Government briefs as to the "questions presented" clearly indicates that they do not really contest the jurisdiction of this court, but rather attempt to reargue the merits of the two cases below.

The Government briefs do not controvert the questions raised by the petition for certiorari but seek to convince this court that the trial court was wrong in the handling of this case both on the condemnation and the cross-claims questions.

I.

AMICUS CURIAE BRIEF.

In the *amicus curiae* brief, which relates solely to the claims against Clark-Congress, the Government, at page 2 of its brief, states as follows:

> "(a) the damages to the tenants flowed from the acquisition by the United States, not from the acts of the owners."

This statement of the question assumes facts directly contrary to the findings of fact by the trial court. See finding of fact 15 (Pet. 8, 9, footnote, Pet. App. 52, 53). Both the Clark-Congress brief and the Government brief completely ignore the trial court finding that a constructive eviction had taken place and hence its entire argu-

ment starts from an erroneous assumption of fact directly contrary to the finding of the trial court.

The Government cannot properly make this argument in the absence of a showing that the findings of fact are clearly erroneous. This they have not even attempted to do, nor did the court below.

The second question presented as listed by the Government, at page 2 of its *amicus curiae* brief, is as follows:

> "(b) the damages, being moving expenses are not compensable."

In listing this as a question involved, counsel for the Government fall into the same error as the court below in attempting to apply federal eminent domain cases rather than Illinois law to constructive eviction cases tried and proven against Clark-Congress.

The third and final question presented by the Government *amicus curiae* brief, at page 2 thereof, is as follows:

> "(c) there is no jurisdiction to try such claims in a condemnation proceeding."

To determine this last question presented by the Government, would demand that this Court take this case on certiorari as the court below held to the contrary.

II.

BRIEF IN OPPOSITION.

In the brief in opposition which relates solely to the condemnation case, as listed in that brief at page 2 thereof, counsel for the Government state the questions to be as follows:

> "1. Whether the Court of Appeals correctly reversed the judgment for improper argument to the jury.

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2. Whether the trial court's rulings on the admissibility of evidence and its instructions to the jury constituted reversible error in that they resulted in the application of an erroneous measure of compensation by virtually eliminating 'market value' from consideration and permitting the taking account of special value to the Government and the lessees and of enhancement due to the purpose for which the property was taken."

Question 1 assumes that the reversal of the condemnation judgments in opinion below was based on improper argument of counsel, whereas a reading of the opinion concerning arguments of counsel (Pet. App. 86) discloses that this assumption is incorrect, as the basis of the court's reversal is found in its statement, in the paragraph preceding its reference to arguments of counsel, in which it cites *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Westinghouse*, 339 U. S. 261 (1950).

In actuality there is no proper basis for the reversal of the condemnation judgments, as an examination of the record in the trial court, including the instructions given by the trial court (Pet. App. 60-69), discloses that the condemnation case was tried entirely within the rules of law contained in those cases, and that the instructions of the trial court were entirely consistent with the law contained in those cases.

Question 2 goes entirely to the merits of the case, makes erroneous assumptions, and is out of place in a proper reply brief as it in no way relates to the opinion of the court below. That the assumption as to an "erroneous measure of compensation" is in error is clearly shown by a reading of the trial court's instructions (Pet. App. 60-9).

ARGUMENT.

The Government's briefs paint the trial court proceeding as unscrupulous and ill conducted—but it ignores the conduct of Government counsel in the trial court and his constant attempts to convey to the jury that petitioners' leases were mere scraps of paper having no value whatsoever. We shall not in this answer attempt to review the individual contentions with respect to the trial itself, the attempt by the Government to oust petitioners without any notice whatsoever (R. 12), nor the consents and agreements of Government counsel to the instructions and evidence now complained of. Possession of the building was what the Government wanted, and possession is what they have gotten, and without payment to your petitioners or the other 77 tenants for their valuable space. The landlord suffered no loss, either in income or possession, but to it have been given all the very material advantages and payments under this deal. The entire transaction should be scrutinized by this court.

The following are typical instances of the confusions raised by the Government's briefs and allegations of matters that were not important in the actual trial:

A. The Government's hiding on appeal behind various clauses in the lease with Clark-Congress which were put into the lease for the very purpose of protecting the Government and Clark-Congress against the rights which they knew the tenants would have if they were browbeaten out of their right of possession (see particularly paragraph 22(b) of the lease, Rec. 91).

B. The attempt to relieve Clark-Congress of liability by the belated institution of the condemnation proceeding

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in order to secure an alleged protection under paragraph 25 of the lease (Rec. 92) which according to the testimony (Rec. 902) was put in the lease for a very different purpose.

C. The representation that the rental to be paid under the Government lease was for office space rather than loft space; whereas, the Government took over the exact space occupied by each of the petitioners on the day of their respective vacation therefrom so that the Government's rental was based on the exact space being taken. They were in fact merely a new tenant in the petitioners' space at an increased rental. What an immediate succeeding tenant would pay for the identical space would seem to be the very best evidence of the value of that space.

D. The statement that the trial court rejected the leases offered by the Government showing space leased at around $1.15 a foot (Opp. Br., pp. 7, 21) without pointing out that these figures and leases were actually given to the jury under the testimony of Jack Witkowski, witness for the Government (Rec. 197).

E. The reference (Opp. Br., p. 24) that Intertype counsel stated that the Government lease would have "tremendous effect on the jury in my favor" when actually that remark (Rec. 461) was made when Intertype counsel consented to the Government, if it so desired, attempting to prove that $47,800 of Government moneys was being wasted on installation of fibre glass draperies on windows throughout the building, including vault space used purely for the storage of defunct and cancelled Government bonds.

F. The inconsistent position taken by the Government in its brief in opposition and its *amicus curiae* brief in seeking to protect itself from either a compensation award or any possible liability under its indemnity to Clark-Congress. The Government's position throughout this

litigation is to force the petitioners into the same unconscionable position as was suffered by the 77 other tenants who were not in a position to resist the Government's scheme of securing full possession of the Rand McNally Building without compensation to any one other than the landlord. Such inconsistencies are apparent in the Government's statement that the Clark-Congress lease was in lieu of a condemnation award and yet their constant reiteration of the statement that part of the nominal deposits made under the declaration of taking were for the benefit of Clark-Congress and not for the sole benefit of the petitioners.

An examination of the record, at page 11, shows that the money deposited was in the total sum of $21,895.00, of which $6,645.00 was deposited for the space occupied by Merchants Matrix, $5,250.00 for the space occupied by Intertype, and $10,000.00 for the space occupied by the Advertising Checking Bureau, and that "the total sum of money estimated by the acquiring authority to be just compensation for that portion of the aforesaid term *commencing January 1, 1952 and ending June 30, 1952*, and hereby taken is $21,895.00" (R. 11), which is the total of the itemized sum above. As each of the Petitioners had a valid lease with Clark-Congress Corporation for a period well beyond June 30, 1952 no part of said deposit could possibly have been made for the interest of Clark-Congress Corporation in said space.

G. The Government has disregarded and repudiated the actions of Government counsel in the trial court and has concealed the fact that the objections of Government counsel to the closing arguments were both infrequent and not addressed to most of the questions now raised, as will be seen by an examination of the record (pp. 518-523, 526-533). Indeed only two very minor objections appear to the closing argument made by counsel for Merchants (Rec.

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534-545) and none at all on the points criticized in the Government's brief in opposition. Neither the opinion below, nor the Government's brief, indicate why the condemnation judgment for Merchants should be in any way affected by the argument of counsel for Intertype.

H. The Government's briefs clearly point up the justice of petitioners' position that the method employed by the Government in securing possession of the Rand McNally Building was not only fundamentally contrary to the basic principles of our Constitution but also in complete violation of all principles of justice and fair play with respect to the rights of the tenants. Nowhere does the Government seek to justify the fact that all of the money paid by the Government for possession of this building has ended up in the pockets of the landlord and not in the pockets of the tenants from whom possession was taken. While castigating your petitioners for not peaceably submitting to the unjust actions of their Government and their landlord, the Government conceals its similar unrecompensed treatment of the 77 other tenants by stating in both briefs that "The building was vacated by all of its tenants except Intertype, Merchants and Advertising" between August and December 1951 (Br. in Opp., p. 4, *amicus curiae* Br., p. 5). Like petitioners, these 77 other tenants were forced to vacate by the combined actions of the Government and the landlord and it is perfectly clear from this record that the Government by largess and recompense induced and required the landlord to cooperate in effecting the prompt evacuation of this building. It was clear to the trial court and to the jury, as it must be to this court if the entire record is reviewed, that the treatment of all tenants in the Rand McNally Building by the Government and the landlord was utterly unscrupulous and contrary to the constitutional rights of these tenants. The entire situation and the conduct of this operation

should be reviewed by this court so that the practice here adopted will not be sanctioned for future use, the rights of citizens will be protected, the condemnation processes not abused and the funds of the Government not diverted into the pockets of others than those from whom the property right has been taken. The Government brief nowhere meets petitioners' argument that they have been deprived of due process of law. The court below in its opinion nowhere makes any reference to market value or to the basis of determining market value or in any way complains that the trial court erred in this respect.

I. The argument in the brief in opposition that more than five years was not leased by the Government in violation of Section 304(c), Title 40 U. S. C., ignores entirely the leasing from August 1, 1951 to January 1, 1952. It was during this period that the constructive evictions took place. It likewise regards the taking of an option as a means of evading the statutory limitation. The Government further admits (Br. in Opp., footnote p. 22) that the Court of Appeals completely overlooked the all-important stipulation (Rec. 108-109) that the taking as to Intertype should be considered the full seven-year balance of Intertype's term.

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CONCLUSION.

There is nothing contained in the Government's brief in opposition to indicate that there is any valid basis of reversal of the condemnation judgments to be found in the opinion of the court below. Rather the long and extended argument from an inaccurately summarized record, indicates directly to the contrary. The Government brief in opposition does not meet petitioner's argument that the trial court on remand has no guide to follow on a retrial, nor any reason to try the case in any other manner than it was tried on the first trial.

Valuation of leaseholds under the market value doctrine developed in fee cases and the application to peace-time taking of the War Powers Act cases, plus arbitrary action between the Government and the landlord to deprive tenants of their rights, should be carefully reviewed by this court in order to establish a fair and feasible means of procedure to protect the constitutional rights of the tenants and to prevent the payment of all compensation into the hands of persons other than those from whom the property interest is taken.

Petitioners assert that the briefs filed by the Government not only do not answer the petition for writ of certiorari, but also demonstrate that it is vital that this court exercise its discretionary right to review the opinion of the court below.

The Government's briefs point up the fact that the failure of the court below to write separate opinions on the condemnation and cross-claims issues which were separately handled in the trial court, resulted in a confused and muddled opinion and reversal of five separate judgments on the basis of reasoning which properly applied to none of the judgments. In other words the court below reversed the cross-claim judgments on the basis of con-

demnation law and reversed the condemnation judgments because of its decision on the counterclaims. Clearly this fundamental confusion by the court below calls for the exercise of this court's supervisory powers.

Respectfully submitted,

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